

REMARKS/ARGUMENTS

In response to the final rejection dated October 22, 2010 and the Examiner's advisory action dated April 29, 2011, Applicant submits herewith a further amendment after final which reduces the number of claims for appeal as well as the issues for appeal.

Reconsideration of this application in light of the above amendments and following comments is courteously solicited.

The undersigned telephoned Examiner Helm who informed the undersigned that the amendment after final filed May 19, 2011 would not be entered because claim 90 would now depend from a canceled claim. Applicant submits a still further amendment under 37 C.F.R. 1.116 incorporating the subject matter of claims 88 and 89 into independent claim 44 and has changed the dependency of claim 90 to depend directly from claim 44.

This amendment should be entered for purposes of appeal.

Applicants believe that the independent claim 44 as amended defines over the prior art for the reasons set forth hereinbelow.

It is submitted that claim 44 clearly defines over the prior art for the reasons set forth in Applicants' last filed amendment. The Examiner appears confused with part of the argument previously presented. The Examiner on page 10, first full sentence of the final rejection, sets forth the following:

"...In the case of the teaching of fatty acid esters with a melting point above 35°C by Krzysik et al., the referenced citation is found at column 5 lines 64-65. These citations have been corrected accordingly in the rejection. Even in the absence of the provided specific citations, both Rouler et al. and Krzysik et al. contained the teachings as discussed in the rejection."

It appears that the Examiner has missed the point raised in Applicants' previous arguments for patentability. The point is the Krzysik et al. reference does not deal with a cosmetic preparation. The Krzysik et al. reference deals with an absorbent article. This is clear from a reading of the Krzysik et al. reference. Thus, the Examiner's statement that the Krzysik et al. reference teaches a set of fatty esters with a melting point above 35°C particularly suitable for use in cosmetic compositions is totally without merit. The Krzysik et al. reference does not deal with cosmetic compositions but rather with an absorbent article.

In addition to the foregoing, it is submitted that the Examiner's rejection is untenable for the following reasons.

According to the Examiner's statement, Krzysik teaches a set of fatty esters with a melting point above 35°C that are suitable for use in cosmetic compositions intended to protect or repair skin as well as cosmetic applications (see Column 4, lines 5-9 and 14-17). Krzysik et al. does not deal with a cosmetic composition. Therefore, Krzysik et al. is not analogous art and not appropriate for combination with the primary reference. The Krzysik et al. reference deals with an absorbent article and not a cosmetic composition. Applicants' claims and disclosure do not deal with a cleansing product and therefore the application of the Krzysik et al. reference by the Examiner in rejecting the claims of the instant application amounts to hindsight reconstruction with no modification in the references nor connection to the process disclosed therein.

According to the Examiner's statement Krzysik teaches "One of these fatty esters that also has the preferred melting point of Roulier is pentaerythritol tetrabehenate (see Column 5, lines 45-46 and 65-66, Column 6, line 16). The teaching of the cited

paragraphs is: "The composition ... include ... solidifying agents." and "Examples of suitable agents include...the following compounds:...pentaerythrityl tetrabehenate". There is no teaching about the use of fatty esters. Furthermore, there is a teaching to elect a solidifying agent from: "alkyl silicones (silicon),...polypropylene (polymer), zinc stearate (soap) and mixtures of such compounds.

Roulier is directed to a "W/O-Emulsion".

Krzysik is directed to an "Absorbent Article" according to title, abstract and claims.

Keeping in mind the definition for "obvious" as the Examiner stated, these documents are not useful for the same purpose. Thus, the combination is not obvious.

There is no teaching in Roulier to use polyvalent esters.

There is no teaching in Kryzik to use polyvalent esters for cosmetic use in general.

In light of the foregoing, it is submitted that the references attempted to be combined by the Examiner are not useful for the same purpose and therefore fail to establish a *prima facie* case of obviousness. It is submitted that the only motivation for combining the references in the manner proposed by the Examiner is Applicants' own disclosure. Such a combination of references as proposed by the Examiner belies the concept as a whole clause of 35 U.S.C. 103. The Examiner's position is untenable and should be withdrawn.

An earnest and thorough attempt has been made by the undersigned to resolve the outstanding issues in this case and place same in condition for allowance. If the Examiner has any questions or feels that a telephone or personal interview would be helpful in resolving any outstanding issues which remain in this application after consideration of this amendment, the

Examiner is courteously invited to telephone the undersigned and the same would be gratefully appreciated.

It is submitted that the claims as pending patentably define over the art relied on by the Examiner and early allowance of same is courteously solicited.

If any fees are required in connection with this case, it is respectfully requested that they be charged to Deposit Account No. 02-0184.

Respectfully submitted,

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Date: June 20, 2011